No. 3953

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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FORBES P. HASKELL, JR., as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a corporation,

*Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a corporation, et al.,

*Appellees.*

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## RECEIVER'S OPENING BRIEF

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Tacoma, Washington.

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*Filed this.....day of February, 1923*

*FRANK D. MONCKTON, Clerk.*



*By.....Deputy Clerk.*

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## RECEIVER'S OPENING BRIEF

### Statement of the Facts

This action was instituted by the McClintic-Marshall Company to foreclose a materialman's lien upon real property owned by the Scandinavian American Building Company, a Washington corporation in Tacoma, Washington, on January 18, 1921. In accordance with the Washington statutes giving such lien, all other lien claimants and all persons having or claiming an interest in the property were joined as parties defendant, except the

Penn Mutual Life Insurance Company, which then held a prior mortgage on the property. Among other defendants the complainant joined Claude P. Hay, as Bank Commissioner of the State of Washington, in charge of the liquidation of the Scandinavian-American Bank of Tacoma, an insolvent banking corporation, and his deputy, Forbes P. Haskell, Jr. Thereafter the office of Bank Commissioner was abolished and the duties of the Bank Commissioner conferred upon an official designated as "The Supervisor of Banking of the State of Washington" J. P. Duke, was appointed by the Director of Taxation and Examination of the State of Washington to the office of Supervisor, and as the successor in office of Hay, appeared in this action.

The joining of Haskell as Deputy, we think, was clearly improper, but because of the facts hereinafter stated it may be somewhat confusing, and for that reason we are calling particular attention to it.

After the institution of this action the State Court appointed Haskell to act as Receiver of the defendant, Scandinavian-American Building Company, and thereafter an application was made in this action for the appointment of a Receiver for the Scandinavian-American Building Company. The District Court followed the lead of the State Court and appointed Haskell, who was thereupon discharged by the State Court. The appointment of Haskell was really done in the interest of economy, he having agreed to serve as Receiver without

compensation. The following is the order appointing him (Tr. p. 52):

This matter coming on regularly to be heard upon the application for the appointment of a receiver for the assets of the defendant, Scandinavian-American Building Company, a corporation, which said application was made by the defendants, Ann Davis and R. T. Davis, Jr., executors of the estate of R. T. Davis, deceased, and Ann Davis and R. T. Davis ,Jr., et al., copartners, doing business as the Tacoma Millwork Supply Company, the Complainant herein appearing by its attorneys, Messrs. Hayden, Langhorne & Metzger, the applicants appearing by their attorneys herein, Messrs, Flick & Paul, and the defendant, Scandinavian-American Building Company being represented by its attorneys, Messrs. Guy E. Kelly and F. D. Oakley, and the attorneys for the complainant and applicants having presented their petition for the appointment of a receiver, and the defendant, Scandinavian-American Building Company, having filed affidavits in resistance thereof, and the Court having considered the same, and being fully advised in the premises,—

And it appearing to the Court that F. P. Haskell, Jr. is a suitable and competent person to act as such receiver,—

IT IS THEREFORE ORDERED, That F. P. Haskell ,Jr., be, and he hereby is appointed receiver of the defendant company, and that said receiver be, and he is hereby authorized and directed

to take possession of all of the property and assets of the defendant of every kind and description; that said receiver be, and hereby is authorized and directed to employ such necessary caretakers and assistants as he may deem necessary to protect the property of defendant during receivership; that said receiver file in this action his oath as such receiver in due form of law, and *the* he file a bond as such receiver as required by law for the faithful performance of the duties involved, the amount of which bond shall be in the sum of $10,000.00, and shall be approved by this Court.

IT IS FURTHER ORDERED, That Guy E. Kelly be, and he hereby is appointed attorney for said receiver.

Done in open court this 23d day of March, 1921.

EDWARD E. CUSHMAN,
Judge.

So Haskell is a proper party to this action, not in his official capacity as a state official, but as a receiver appointed by the District Court in this action, and as such Receiver he has appealed to this Court from the Decree.

The defendant, Scandinavian-American Building Company was incorporated in November, 1919, under the laws of the State of Washington, with power to acquire and improve real property, and for that purpose to borrow money (Ex. 179, Tr. p. 985). The particular purpose was to erect and operate an office building upon Lots 10, 11 and 12 in Block 1003, Map of New Tacoma, in Tacoma,

Washington.

For that purpose in February, 1920, it acquired title to Lot 10 from Charles Drury, its President, paying therefor $65,000.00, and acquired title to Lots 11 and 12 from the Scandinavian American Bank of Tacoma under an agreement whereby it agreed to place a $600,000.00 first mortgage upon the three lots and a $750,000.00 second mortgage thereon, the second mortgage to secure a bond issue of that amount, and to erect with the money derived therefrom a sixteen story modern office building and to provide upon the ground floor thereof space for a banking room, to be reserved for the use of the Scandinavian-American Bank of Tacoma, at a rental to be agreed upon, and agreed to deliver to the Bank bonds of the par value of $350,000.00 out of the second mortgage bond issue, before June 10, 1920. (Ex. 184, Tr. p. 1020 et seq.)

Prior to that time one G. Wallace Simpson, an eastern bond broker, had secured and agreement from an eastern concern, Straus & Company, to loan $810,000 upon the property upon a building mortgage, but the terms of the contract proposed by Straus were such that the offer was rejected, (Tr. p. 1041) and an application had been made to the Metropolitan Life Insurance Company, which had agreed to lend $600,000.00 upon the proposed building when the same was completed. (Ex. 177, Tr. p. 981 et seq.). Simpson had represented to the Company that he could arrange to obtain the funds for temporary use, if the proposed Metro-

politan Mortgage were made to run to him, and in accordance with that representation the Metropolitan had agreed to take an assignment of the mortgage instead of requiring that it run directly to it, (Ex. 222, Tr. p. 1093). In its agreement, however, the Insurance Company had provided that the mortgage had to be placed of record before any work should be done on the new building, and that the contracts with the contractors furnishing labor and material for the building should have clauses subordinating their right to liens to the lien of the mortgage. (Ex. 177, Ab. p. 984.)

The Building Company had employed Mr. Frederick Webber of Philadelphia, as architect, and he had prepared plans which had been submitted to the Metropolitan.

Simpson and Webber represented that they had placed the second mortgage bond issue, and that as soon as it was executed and delivered the $750,000.00 would be forthcoming, leaving for the Building Company after its payment to the Bank, $400,000.00 in cash for immediate use. (Tr. p. 1018.)

Besides this, the Scandinavian-American Bank of Seattle had agreed to take $150,000.00 of these second mortgage bonds, in case of necessity.

The Building Company was incorporated for $200,000.00, practically all of which was subscribed for by O. S. Larson, the President of the Scandinavian-American Bank of Tacoma, who represented that he had arranged to get the money for the stock. (Tr. p. 1169.)

So that there was apparently available for the building ample funds, since the building was to cost less than $1,100,000.00.

After acquiring title to this property the Building Company entered into the contracts with the lien claimants in this action, as contractors, who state that they were told by Mr. Drury, the President of the Company, of this proposed $600,000.00 mortgage, and of the requirement that the right to liens had to be waived. Also that there would be $400,000.00 in cash available for construction purposes pending the completion of the building, when the $600,000.00 would be payable by the Metropolitan Insurance Company.

The contract entered into between the McClintic-Marshall Company and the Scandinavian-American Building Company was on the "standard form" prepared and used by the McClintic Company, and contains the following clauses (Exhibit "A", Tr. p. 40):

> "ARTICLE I. The Contractor agrees to furnish and deliver F. O. B. cars, their works, present rate of freight allowed to Tacoma, Washington, * * * the structural steelwork for the Scandinavian-American Bank Building * * * in accordance with the plans covering steel and iron work as prepared by Frederick Webber.
>
> "ARTICLE II. The Contractor agrees to begin shipment of the material within 60 days and to make complete shipment of material within 120 days after the date of this agree-

ment * * *

"ARTICLE X. It is also agreed between the parties hereto that any dispute whatsoever growing out of this Agreement shall be referred to three Arbitrators, one to be appointed by each of the parties to this agreement and the third by the two thus chosen, * * *. The decision of any two of these shall be final and binding * * *

"IN WITNESS WHEREOF, the parties hereto have executed this agreement at Pittsburgh, Pa."

Out of approximately four and a half million pounds of steel contracted to be furnished by the McClintic-Marshall Company before June 6, 1920, it had shipped only about 150,000 pounds, or 2½% up to August, 1920, (Tr. pp. 657-8) and as a result of this breach of the contract, the Building Company was during that time claiming a loss of $5,000.00 per month, and the Building Company in September, refused to make any further payments for steel.

Under date of September 30th, Larson wired Sheldon: "Withhold payment steel invoices" (Ex. 343 p. 1225-6), and under date of October 7, 1920, he wired Sheldon: "Do nothing McClintic-Marshall until last car received," and in fact did not pay the McClintic-Marshall anything for its shipments made during August, September, October and November, being practically all of the steel, although at that time it was paying the other con-

tractors in accordance with the terms of their contracts.

The Federal jurisdiction of this suit depends upon the McClintic-Marshall claim, that being the only lien asserted by a non-resident, greater than $3,000.

Our objection to the jurisdiction of the Court to try the case on account of the refusal of the McClintic-Marshall Company to arbitrate and on account of the receivership was interposed before any evidence was taken upon any claim, and the letters showing the existence of this controversy are as follows:

At the beginning of the case, and before the introduction of any evidence therein, the following occurred:

MR. OAKLEY (Tr. pp. 656-657):

Before the first lien claim is started to be proved the Receiver wishes to make this objection to the introduction of any testimony that has to do with the lien foreclosure suit. We object for the reason that the property of the Scandinavian-American Building Company is now in the hands of this Court through the appointment of a Receiver, and a lien foreclosure suit cannot be maintained looking toward the sale of the premises while the Court itself is administering the estate that has been held in the State of Washington and held in the United States Supreme Court as late as 241 U. S. page 587, in *Bacon vs. Standard*, 60 Law. Ed. 1191 * * * I want to show that the point has been

raised properly before the Court and I am objecting to the proof of contractors and anything looking to the foreclosure of the liens.

THE COURT: It will be so considered.

Prior to the introduction of any testimony on behalf of the complainants, McClintic-Marshall Company, the following occurred:

MR. OAKLEY: * * * The Receiver objects to the introduction of any testimony on the McClintic-Marshall claim for the reason that the contract provides that any controversies arising out of the contract should be submitted to arbitration, which was not done, and therefore bars the action. This was passed upon by the Court and I now renew the objection.

THE COURT: The objection overruled, exception allowed.

**Exhibit No. 7**

Letter from Larson to McClintic-Marshall Company, dated June 16, 1920:

> "This morning we received the following telegram: Have shipped only girders to date. Traffic conditions and shortage of cars have forced mills to practically suspend rolling mill for past two weeks. The outlook more promising at present time. Hope to receive material for lower floors your building about July 1st and to make shipments in July. Shipment of entire building by first of September. It is impossible to make definite promise until mills resume operations."

In our former letter to you we pointed out that our steel contract was awarded to your company under representations that the necessary steel for the entire building was to be taken out of the stock in five different yards, as we remember it, and when I was in the East the last time, being with your Philadelphia representative about April 5th, I was assured that the first shipment of steel would go forward not later than the 10th of April. Now it turns out that the rolling material has to be secured from the mills and that the steel was not in stock at all. I wish to point out again that we have been ready to erect this steel for the past six weeks and that the delay is costing us $5,000 per month in interest and carrying charges on the building. (Tr. p. 658.)

**Defendant's Exhibit No. 8 (Tr. p. 972)**

SCANDINAVIAN-AMERICAN BANK

Tacoma, Washington, June 14, 1920.

Mr. C. D. Marshall,
McClintic-Marshall Company,
Pittsburg, Pa.

Dear Sir:

Enclosed herewith please find confirmation of night letter sent you to-day, and while we have no doubt that you have done everything possible about the movement of this steel, we wish, nevertheless, to point out that the foundations for this building have been completed for practically a month even though we have been delaying the work on account of the nonarrival of the steel, and that now the

investment in the foundation and the real estate on which it stands is costing us approximately $5,000.00 per month during the time that the building is being delayed.

**Defendant's Exhibit No. 9 (Tr. p. 973)**

SCANDINAVIAN-AMERICAN BANK

Tacoma, Washington, June 23, 1920.

PERSONAL.

C. D. Marshall, President,
McClintic-Marshall Company,
Pittsburg, Pa.

Dear Mr. Marshall:

I wish to acknowledge receipt of the following telegraph from you received this morning:

* * * * * * * * * *

At the same time, we wish to announce that the first shipment of steel, being the car of grillage, arrived in the yards in Tacoma this morning and will be unloaded this afternoon.

I have already pointed out to you the necessity for quick action in moving this steel on account of the fact that a public institution is involved in the construction of this building, and that as far as possible, a bank should avoid public criticism, even that of being criticized for being slow in the construction of a bank building. May we not have the assurance from you that this contract of ours will have the right of way from now on?

**Defendant's Exhibit No. 10 (Tr. p. 974)**

SCANDINAVIAN-AMERICAN BANK

Tacoma, Washington, June 29, 1920.

H. H. McClintic, Vice-President,
McClintic-Marshall Company,
Pittsburg, Pa.

Dear Mr. McClintic:

This is to acknowledge receipt of your letter of June 24th.

* * * * * * * * * *

We are very much surprised to learn that the contract you have for furnishing steel for the Telephone Building at Seattle was let two months later than the contract for our bank building, and you have to date delivered considerable more steel to the Seattle Telephone Building than you have delivered to this bank building. I do not want to be bothering you by continually writing to your company about this matter, but I do hope that you will bend every effort to get this steel delivered as quickly as possible. You have got to realize that in this matter you are dealing with a banking institution which should at all times, as far as possible, avoid any public criticism, even on such a matter as this. Upon receipt of this letter, I would like to have you write me fully as to the progress of this steel order and when we may expect to get some more cars on the way out here.

**Defendant's Exhibit No. 11 (Tr. p. 975)**

SCANDINAVIAN-AMERICAN BANK

Tacoma, Washington, July 6, 1920.

SPECIAL DELIVERY.

C. D. Marshall, President, or
H. H. McClintic, Vice-President,
McClintic-Marshall Company,
Pittsburg, Pa.

Gentlemen:

Referring to my former letters to you, I beg to enclose herewith a picture taken July 2d, during the noon-hour, of the two corners at 11th Street and Pacific Avenue, in Tacoma, showing in the extreme background, the Bank of California Building, next to it, the W. R. Rust Building under construction and in the foreground the foundations and the grillage just received for the new Scandinavian-American Bank Building. Construction on the Rust Building was started several weeks after the placing of foundations of the Scandinavian-American Bank Building had begun: Mr. Rust purchased his steel in Minneapolis, and we understand that the entire delivery will be effected on July 20th. This picture brings forcibly before us the actual situation regarding the construction of our building.

I hope that you gentlemen, Mr. Webber and Mr. E. E. Davis, the steel erector, who has just left here, will find some way to get our steel here at once.

**Exhibit No. 12 (Tr. p. 976)**

Letter from Larson to H. H. McClintic, dated July 20th, 1920:

> "We have previously pointed out to you that the steel order was awarded to your company from among several competitors on representation of your Philadelphia representatives that most of this steel would be taken out of stock in five different yards. It now turns out that you did not have the steel at all at the time this representation was made. * * * If this material can be had in the country, it seems to me that it is up to your people to buy it wherever you can get it and get it out here immediately in order to save us the added carrying charges which are accruing every day."

**Defendant's Exhibit No. 14 (Tr. p. 977)**

SCANDINAVIAN-AMERICAN BANK

August 6, 1920.

McClintic-Marshall Company,
Pittsburg, Penn.

Gentlemen:

Referring to your contract of February 5, 1920, for the furnishing of steel for the Scandinavian-American Bank Building, you, of course, are advised that there will be a substantial increase in freight rates beginning on September 1, 1920. Under your contract with us you agreed "to furnish and deliver f. o. b. cars there works, present rates

of freight allowed Tacoma, Washington."

Under these circumstances we deem it proper to advise you that it is imperative that the shipments be made before September 1st.

Owing to the delays already occasioned, through no fault of ours, we are daily sustaining heavy losses; hence we urge prompt shipment of our material.

Very truly yours,
SCANDINAVIAN-AMERICAN BUILDING CO.
By CHARLES DRURY,
President.

**Exhibit No. 104**

Letter from McClintic-Marshal Company to O. S. Larson, dated June 24, 1920.

"Our proposition for this work contemplated taking considerable material from stock and we have done so wherever possible."

**Exhibit No. 117**

Frederick Webber to McClintic-Marshall Company. Letter dated May 1, 1920.

"You seem to be laboring under a wrong impression in regard to our steel work of the Scandinavian-American Building, Tacoma, Washington, and I am astonished to find such an excuse this morning, that you are waiting for the steel for your grillage and Mr. Chudduck informed me before he left that this was all in the shop. Our arrangement with Mr. Chudduck was as per our

specifications, that four stories of the material was to be bought in the open market for immediate delivery. And he informed me that McClintic-Marshall was the only concern in the Country who had the length and size of plates for the girders. We made substitutions to conform with the material you had on hand, and you entered into a contract with me under these conditions and according to the specifications.

"We changed our plans to suit the material that you had in stock and he informed me before he went away that as far as grillage was concerned, it was all in the shop and they were working on it, and now I understand from you that you are waiting for it from the mills. The Scandinavian-American Bank people were willing to pay you an extra price which was considerably more than anybody else figured in order to take the material from your stock which Mr. Chudduck informed me he had on hand.

"A long time ago your Mr. Burpee informed us a lot of the material had already been cut from material that was already in stock. You are certainly laboring under a wrong impression as your steel for the grillage should have been shipped according to our contract long before the railroad strike occurred. I trust I shall get a very different report from you by return."

**Exhibit No. 118**

Letter from Frederick Webber to McClintic-Marshall Company dated May 7, 1920.

"I dont' seem to be able to get any satisfaction to my inquiries with regard to the steel work for the above building. It was thoroughly understood between your Mr. Chudduck and myself that the steel work was to either be bought in the open market, as per our specifications, or to be taken from stock. After making inquiries Mr. Chudduck informed me that he was able to get the material for the first four floors as per the requirements of the specification. He also informed me before taking the contract that he had been able to obtain the plates for the large girder over the banking rooms. The other work he desired to alter to suit such material as you had on hand, which he informed me was about 30,000 tons. Our steel plans and layout has been changed to suit this condition, and I cannot understand why I cannot get more definite information in regard to this work. I am trying to find out how much of this has been fabricated. According to the contract, the grillage has to be shipped within two months from the 5th of February. Various changes were made in the grillage to suit the material you had on hand. Mr. Kennedy now informs me that you are waiting to have these beams rolled at the mill which is so foreign to my understanding, specifications and contract.

"It seems to me that it will be necessary to keep a man to look after this work in Pittsburg as at

the present time the letters I have been writing do not seem to bring any results. If it is necessary I will come to Pittsburg and go over this matter with you as it appears to me that you have not the right impression of this contract."

**Exhibit No. 122**

Letter from Frederick Webber to McClintic-Marshall Company dated June 12, 1920.

"Your letter of June 10th received and contents noted. I am very much surprised to get your report. It is past my comprehension how you could have taken a contract and undertook terms as are specified in our specifications and carried forward in your contract, and now, after four months, which is the expiration of your contract, to send me such a report as you do. Of course, it is quite evident that you did not have the material for the four floors in stock as Mr. Chadduck stated that you had, therefore you are not adhering to the specifications and contract. If you had four stories as per the contract, it would be possible for us to make a very good beginning, even if there was quite a delay on the other work.

"In your report you do not say the condition of the work for the big girders and columns for the banking floor, what condition they are in or how much work is being fabricated of same. The building committee has sent for me to come out there as they cannot understand why they are paying the highest price for the material and not receiving same, and it was thoroughly understood

that they should. You are putting me to the trouble of going there to explain why you have not lived up to your contract. According to your reports after four months not more than fifty per cent has even been rolled yet. This does not trouble me so much as the point that the four stories were to be taken from stock or bought in the open market and considering that the building company are paying you $18,000 more than the contractors who figured on this work, but stated that they could not have the material in stock and would have to wait until it was rolled. As I state, I must ask you for a more definite report on the work done on these first four floors."

**Exhibit No. 125**

This is a statement showing the amount paid for extra work by the building company for correction of certain items and mistakes in the steel frame work furnished by the complainant, aggregating $3,000.

The Building Company also claimed that by reason of the increase of freight rates after the date upon which all of the steel should have been shipped under the terms of the contract, it lost $14,052.76 (Tr. p. 665) and that by reason of the faulty construction of steel shipped by the McClintic-Marshall Company, it was damaged in the sum of approximately $3,000.00, and the McClintic-Marshall Company admitted that of this amount, $1100.00 should be charged to them on that account. (Tr. p. 664).

As we have said, the contractors with the exception of a few signed contracts which by their terms expressly waived the right to lien. These clauses were the same in each instance, and are as follows:

ART. XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic's claim for lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.

The Receiver in his answer to the McClintic-Marshall petition alleged that by reason of the failure of the complainant to ship the steel in accordance with the terms of the contract, the building company had suffered a loss of $50,000.00 and that repeated demands had been made upon complainant to arbitrate the losses sustained thereby, which demands had been ignored (Tr. pp. 58-64) which portion of the answer was, by the Court, stricken therefrom. (Tr. pp. 66-68).

The Court in his Decree held that the waivers were induced by fraud and that by reason thereof "*the waivers are decreed to be of no force and effect*" (Tr. p. 521, Paragraph XXXIII.) and allowed the contractors liens *for the contract price and upon the contracts.* Thus setting aside *one clause* of the contracts on account of fraud, but enforcing the balance of the same contracts. One of the claimants, however, the E. E. Davis & Company, was consistent enough to offer to rescind the

contract, but nevertheless directed all of its evidence to the contract price.

The Receiver filed the following:

**Assignments of Error (Tr. p. 547)**

**I.**

The court erred in holding that the McClintic-Marshall Company, a corporation, complainant herein, has a valid and subsisting materialmen's lien upon the real estate, premises, or any part thereof described in paragraph three of said Decree, for the reason that the arbitration agreement contained in the contract between the complainant and the Scandinavian-American Building Company was not complied with by the complainant and its failure and refusal to arbitrate matters in dispute under the contract constituted a bar to the prosecution of this action to maintain and foreclose a lien claim.

**II.**

The court erred in not holding that because of the arbitration agreement contained in the contract between McClintic-Marshall Company, and Scandinavian-American Building Company, that the complainant had waived its right of lien under the Statutes of the State of Washington, in such cases made and provided, until and unless it had substantially complied with the arbitration agreement which was a binding and valid agreement under both the laws of the State of Washington, and of the State of Pennsylvania, the domicile of complainant corporation.

III.

The court erred in refusing to hold that because of the arbitration agreement referred to in the two preceding assignments of error the court is without jurisdiction to hear and determine the merits of said claim and for that reason had no jurisdiction to hear and determine the subject matters involved in this litigation, and has no jurisdiction of the parties.

IV.

The court erred in permitting the introduction of testimony in proof of the complainant's complaint and lien claim for the reason that the contract between complainant and the Scandinavian-American Building Company upon which complainant bases its right of recovery, provides that any controversies arising out of the contract should be submitted to arbitration, which was not done and said failure and refusal so to do constitutes a bar to the prosecution of said lien claim.

V.

The court erred in not dismissing the Bill of Complaint.

VI.

The court erred in holding that the Puget Sound Iron and Steel Works, a corporation, has a valid lien as provided in paragraph ten of said decree, for the reason that the said corporation never filed any complaint or cross complaint, or other pleadings in this action, seeking a foreclosure of its alleged lien, and under the laws of the State

of Washington, such action must be instituted within eight months from the filing of its said lien claim.

**VII.**

The court erred in decreeing a foreclosure of liens in this action because that when the court appointed a receiver for the Scandinavian-American Building Company in the above entitled action, the court deprived itself of the power to foreclose the lien claim and had only the power and right to allow or reject claims in the receivership proceeding and to determine the rank and priority of each claim allowed.

**VIII.**

The court erred in holding lien claimants entitled to interest and attorney's fees for the reason set forth in Assignment of Error No. VII and for the further reason that in a receivership proceeding interest and attorney's fees are not allowable as attempted to be allowed in the decree entered herein.

**IX.**

The court erred in holding in paragraph XXXIII of the decree entered herein that the Tacoma Millwork Supply Company, E. E. Davis & Company, Edward Miller Cornice & Roofing Company, Otis Elevator Company, H. C. Greene, Washington Brick Lime & Sewer Pipe Company, Ben Olson & Company, were induced to enter into their contracts containing waivers of lien by reason of false and fraudulent representations made on behalf of the

Scandinavian-American Building Company, and in decreeing that by reason thereof that the said waivers be of no force and effect and in allowing any of said claimants in this paragraph XXXIII mentioned, or Crane Company, a lien claim or claims, in this action, for the reason that the said lien waiver clauses are valid and binding obligations.

**Argument**

I.

The Receiver contends:

1. That the arbritration clause continued in the McClintic-Marshall contract, bars this action.

2. The lien waiver clauses are valid obligations.

3. The appointment of the Receiver bars the action as a lien foreclosure.

Upon our first contention the evidence presents a most interesting and enlightening situation. The McClintic-Marshall Company, a Pennsylvania Corporation, as vendor, makes a contract with the Scandinavian-American Building Company, a Washington corporation, as vendee, whereby it agrees to "furnish and deliver F. O. B. cars", its works, the steel for a large building before June 6, 1920, "present rate of freight allowed" "in accordance with plans." It fails to "furnish or deliver" the steel before September when the freight rate is raised, and it fails to furnish the steel "in accordance with plans." The vendee does not de-

clare the contract at an end because of these breaches but accepts the faulty steel when shipped in September, October and November and pays the increased freight rate. The contract provides for the submission to arbitration of disputes arising thereunder, and while the contract is still executory the vendee demands an arbitration of these disputes. The vendor refuses to arbitrate, ships the steel and files a mechanics lien, a right created by the Washington Statutory Law. Under the common law of Washington the vendor could not foreclose under these circumstances, so it seeks the aid of the Federal Court sitting in Equity, claiming that the Federal Court is not bound by the Law of Washington where the res is situated, or the Law of Pennsylvania, the State where the contract was made and fully performed, admitting that it would have no standing in the State Court of either Washington or Pennsylvania, thus seeking the aid of the Federal Court of Equity to enable it to circumvent the laws of its own domicile and the laws of the State of Washington.

It is our contention that this is equivalent to asking a Court of Equity to assist it in the commission of a fraud.

We believe that the Court should have given effect to this arbitration clause and to its breach by the complainant,

1st. Because under the common law of Washington these facts would preclude the maintenance of this action, and the action is, by its nature, local.

2nd. Because this clause does not oust the Court of jurisdiction and is therefore valid under all decisions since its application was to facts and disputes arising during the progress of the completion of the contract, and does not oust the Courts of jurisdiction to foreclose the lien after the controversies arising under the contract have been determined by the arbitrators.

3rd. Because a court of equity will not lend its aid to a contract breaker.

4th. Because the public policy of the United States with respect to these arbitration clauses has changed if we assume that the policy was over against arbritration.

5th. This contract was made in Pennsylvania to be entirely performed in Pennsylvania, and it would certainly seem to us that the law of Pennsylvania which holds such a clause valid should have some controlling force. The contract right to arbitrate should not be lightly taken away upon the theory that it provides a remedy merely and is inconsequential.

1. We contend, first, that because of the arbitration clause contained in the contract made between the parties, that the McClintic-Marshall Company has no lien which can be enforced by this Court.

This is a plea to enforce materialman's liens, as distinguished from an action to recover judgments for debts. The materialman's lien does not exist at common law. It is a pure creature of statute. The action to foreclose such a lien is an action in rem entirely dependent upon the State statutes which create the right and provide the remedy. It must, therefore, be regarded as a statute which creates rights in real property and affects the title to real property, particularly since it deals entirely with real property.

The general rule is that on all questions which relate to the rights in or title to real property, the Federal Court must follow the decisions of the Supreme Court of the State, under the "Full faith and credit clause" of the United States constitution, as is illustrated by the case of *Hartford Fire Insurance Company vs. Milwaukee & St. P. Ry. Co.*, 175 U. S., 91, in which the Supreme Court holds that the validity as affected by public policy, of a stipulation in a lease exempting a railroad company from liability for negligence for setting fire to a storage warehouse on the railroad right-of-way, was a question upon which the decisions of the State Court were binding upon the Federal Court.

Rights and titles to things which have a per-

manent locality such as the rights and titles to real estate are governed by the decisions of the State Supreme Court, even though such questions may arise in the Federal Court.

*Swift vs. Tyson*, 16 Pet. 1, 10 L. Ed. 800.

This rule has been steadily adhered to in the Federal Court and finds expression by Justice Harlan in the case of *Guhn vs. Fairmount Coal Co.*, 215 U. S. 349; 54 L. Ed. 228, where he says that the Federal Court is bound by the decisions of the State Supreme Court, where, before the rights of the parties accrued, certain rules relating to real estate have been so established by State decisions as to become rules of property.

The written contract which is the basis of the McClintic-Marshall Company's rights, insofar as its rights attach to the real property described in the complaint must therefore be construed with reference to the common law of the State of Washington.

While the Federal Courts, when construing commercial contracts which have no refrence to real property, in actions for the mere recovery of a debt, are free to decide the question of construction independently of any decisions of the State Supreme Court, yet, when the contract becomes the basis for a right in real property, and that right is being asserted in an action based upon a local statute which creates the right, the question must necessarily become a local one, and the Federal Court must follow the decisions of the Supreme

Court of the State in which the real property is located.

Thus where it appears that the State Supreme Court has construed certain language found in a deed, will, or other monument of title, and has held that this language grants an estate or confers rights in real property, the Federal Courts must give the same effect to the language.

*Buford vs. Kerr*, 90 Fed. 518.

The decisions of the State Supreme Court are binding upon the Federal Court upon the question whether a deed reserving a vendor's lien vested title in the grantee.

*Oliver vs. Clarke*, 106 Fed. 402.

Also whether the granting clause of a deed will prevail in case of a conflict with the other parts of the deed.

*Dickson vs. Wildman*, 183 Fed. 398.

So the settled law of a State on the subject of mortgages has been held to be a rule of property which is binding upon the Federal Court.

*Haggart vs. Willczinski*, 143 Fed. 22.

Also the nature and extent of the mortgagees rights.

*Omaha vs. Omaha Water Company*, 192 Fed. 246.

So, also, all questions relating to chattel mortgages are generally held to be local questions upon which the Federal Court are bound by the decisions of the State Supreme Court.

*Humphrey vs. Tatman*, 198 U. S., 91;

*Thompson vs. Fairbanks*, 196, U. S. 516.

State decisions establishing the rule that a vendor's lien does not pass under an assignment of the debt secured, must be followed as a rule of property by the Federal Court.

*Over vs. Gallegher*, 193 U. S. 199.

We have found only two decisions in the United States Supreme Court dealing with statutory mechanic's or materialman's liens. The first is the case of *Van Stone vs. Stillwell*, 142 U. S. 128. In that case the question was as to certain rights established by the lien statute of the State of Missouri, and, although the Supreme Court of the United States did not say so in words, yet it is significant that in deciding the questions at issue, the Supreme Court referred only to Missouri cases.

This precise question, however, was decided by the United States Supreme Court in the case of *Knapp, Stout & Co. vs. McCaffrey*, 20 Sup. Ct. R. 824, 177 U. S. 638. In that case the plaintiff had made a contract to tow certain logs. It was not paid the contract price, and brought an action in the State Court of Illinois asserting a possessory lien upon a half of a raft of logs which it had in its possession, for the whole debt due it under its contract. The defendant raised the question as to the plaintiff's *right to a possessory lien* upon the part of the logs under the laws of the State of Illinois, *the extent of the lien*, and also the question as to whether or not the plaintiff under the facts of that case, did have the *possession* of the

logs, and also contended that the plaintiff had only a maritime lien, enforceable only in the Federal Court. The case was decided by the Court of Illinois in favor of the plaintiff, and the defendant appealed to the Supreme Court of the United States, which decided that the lien was not a maritime lien, and the decision then reads:

"In the case under consideration the remedy chosen by the plaintiff was the detention of the raft for his towage charges. That a carrier has a lien for his charges upon the thing carried, and may retain possession of such thing until such charges are paid, is too clear for argument. We know of no reason why this principle is not applicable to property towed as well as to property carried. While the duties of a tug to its tow are not the duties of a common carrier, it would seem that his remedy for his charges is the same, provided that the property towed be of a nature admitting of the retention of possession by the owner of the tug. But whatever might be our own opinion upon this subject the Supreme Court of Illinois, having held that under the laws of that state the plaintiff had a possessory lien upon this raft, that such lien extended to so much of the raft as was retained in his possession, for the entire bill, and that under the facts of this case plaintiff did have possession of the half raft until he surrendered it under the order of the court for its release upon bond given, we should defer to the opinion of that court in these particulars as they are local questions dependent

upon the law of the particular state."

In the case of *Fidelity Ins. & Safe-Deposit Co. vs. Shenandoah Iron Co.*, 42 Fed. Rep. 378, the Court says:

"It is a well-settled principle that the decisions of the highest state courts, in the construction of the state constitution and laws, are to be adopted by the federal courts. This doctrine is established by numerous decisions. Spear, Fed. Jd. 645, 646; *Shelley vs. Guy*, 11 Wheat. 361; *Jackson vs. Chew*, 12 Wheat, 153; *Green vs. Neal's Lesses*, 6 Pet. 291; *City of Richmond vs. Smith*, 15 Wall. 429. The decision of the court of appeals of Virginia in the case cited controls in this cause. The reasons assigned in that case for holding the acts unconstitutional as to supply claims against a railway company apply with equal force to supplies furnished a mining or manufacturing company; and the court decides that the material and supply claims existing prior to the appointment of the receivers have no priority over the lien of the mortgage bonds."

In the case of *Griseler, et al.*, 136 Fed. Rep. 754, the Court says:

"The trustee, in making the application, seems to have acted upon the theory that he obtained a priority over the Van Kannel Revolving Door Company because the latter's notice of lien was not filed until after the filing of the petition for adjudication of bankruptcy. The decision of this court in *Re Roeber*, 9 Am. Bankr. Rep. 303, 121

Fed. 449, 57 C. C. A. 565, that a trustee in bankruptcy of a contractor was entitled to priority over a materialman who had not filed his notice of lien until after the institution of the bankruptcy proceeding, was based upon the consideration that the trustee succeeded to the same title which would have vested in an assignee of the contractor for the benefit of creditors, and adopted the construction of the mechanic's lien law (Laws 1897, p. 514, C. 418) which at that time was supposed to prevail in the courts of New York. It had been held by the state courts that the statute did not preclude the contractor from paying his creditors out of the moneys due or to become due to him from the owner, to the exclusion of the materialmen who had not filed liens, and that, until the materialman had filed his notice of lien, he was merely a creditor at large of the contractor. *McCorkle vs. Hermann*, 117 N. Y. 297, 22 N .E. 948; *Mack vs. Colleran*, 136 N. Y. 617, 32 N. E. 604; *Stevens vs. Ogden*, 130 N. Y. 182, 29 N. E. 229. Some of the state courts had also held that, the materialman being merely a creditor at large until the filing of his notice of lien, he could not obtain priority over a general assignee of the contractor for the benefit of creditors by filing the notice subsequent to the making of the general assignment. This court, in Re Roeber, approved the reasoning of these decisions, and, following their construction of the statute, held that the materialman who had not filed his notice of lien could not acquire priority

over a trustee in bankruptcy of the contractor by filing his notice subsequent to the time when the title of the trustee accrued. Since that decision, however, the New York Court of Appeals, in *John P. Kane Company vs. Kinney*, 174 N .Y. 69, 66 N. E. 619, has overruled the decisions of the state courts which were followed by this court; and, as this is a decision in the construction of a state statute by the highest court of the state, this court should follow it."

In the case of *The Winnebago*, 114 Fed. Rep. 945, the syllabus says:

"The Michigan Water craft act (Comp. Laws, p. 298), which gives a lien to the contractors and persons furnishing labor and materials in the construction of vessels, relates to contracts which are not maritime, and its construction by the Supreme Court of the state in binding on the federal courts."

In the case of *Morgan vs. First National Bank of Mannington, et al*, 145 Fed. Rep. 466, the Court says:

"Regarding the claim of the Pittsburg Gage & Supply Co. for $2,193.15, the mechanic's lien in that case does not appear to conform to the laws of the state of West Virginia as construed by the Supreme Court of Appeals of that state, by which decision we feel bound in determining upon the validity of the statutory lien enforceable in bankruptcy. The precise question raised as to this lien —namely, whether the affidavit supporting this lien, taken before a notary public in the State of

Pennsylvania, was properly authenticated—was decided in the case of *Lockhead vs. Berkley Springs W. & I. Co.*, 40 W. Va. 553, 21 S. E. 1031, and such an authentication as we have in this case was therein declared to be insufficient under the laws of West Virginia, and the mechanic's lien declared on that account invalid. The claim of the Pittsburg Gage & Supply Company will therefore be treated only as an unsecured claim in the future conduct of this case."

In the case of *George A. Shaw & Co. vs. Cleveland, C. C. & St. L. Ry. Co.*, 173 Fed. Rep. 746, the syllabus says:

"The construction of a state Constitution or statute by the highest court of the state is binding upon the federal courts in cases involving rights which arose after such construction was given."

In the same case the brief says:

"But it is said that this court, in *Jones vs. Great Southern Fireproof Hotel Company*, 86 Fed. 370, 30 C. C. A., 108, held that section 3184, Revised Statutes of Ohio, as amended by the act of April 13, 1894, was not unconstitutional under the Constitution of Ohio, but was valid and enforceable, and that in that view we were affirmed by the Supreme Court in *Great Southern Fireproof Hotel Company vs. Jones*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778. The lien asserted in *Jones vs. Great Southern Hotel Company*, and enforced by this court, arose before the Ohio court had decided *Palmer vs. Tingle*, and before the Ohio court had

decided any case affecting the constitutionality of any act creating a lien in favor of persons having no direct contract with the owner. We were, therefore, not only at liberty, but under obligation to exercise an independent judgment in respect to the validity of the statute in question. The lien now asserted arose long after the decision in *Palmer vs. Tingle*, and, if that decision is to be regarded as a construction and application of the organic law of Ohio, it is obviously our duty to accept that construction and apply it to the case now under consideration, inasmuch as we are not now dealing with rights which arose before that decision, but with rights under contracts made long since that construction."

The McClintic-Marshall Company was seeking to invoke the jurisdiction of the Federal Court to give it a right which it did not have by virtue of either the common law or the Statutary law of the United States, but which it had, if it had any right at all, under the statutory law of the State of Washington. Under these circumstances, it seems to us, that the complainant could not ask the Court to give it a right *created* by the Washington statute, and at the same time to ask this Court to ignore the Washington Common law, which doubtless was considered by the Washington Legislature when it created that right, and which adds a condition precedent to the enforcement of that right.

The Washington statute, giving a materialman a lien must be construed by this Court in the light

of the Washington common law. Any act of legislation must be read in the light of the common law.

"That * * * is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law."

*Sthick vs. United States*, 24 Sup. Court Reporter, 826, 195 U. S. 65.

We think there can be no serious contention but that the complaint of the McClintic-Marshall Company would have been dismissed upon demurrer in the State Court of either Washington or Pennsylvania. The Supreme Court of the State of Washington, in the case of *Herring Safe Company vs. Purcell Safe Company*, 81 Wash. 592 at page 595, says:

"You have held in a long line of cases that where parties enter into a contract and provide therein that all differences between them that may thereafter arise out of the contract shall be submitted to a board of arbitrators whose decisions thereon shall be conclusive and final upon the parties, no action can be maintained on the contract by either party until he has tendered arbitration of the difference to the other party, and such other party has refused the tender." (Citing many cases.)

The arbitration clause in the contract would be a condition precedent to the assertion of its lien right in Washington on the part of the complain-

ant. Even if we were to concede that if the McClintic-Marshall Company had brought this suit in the Federal Court upon this contract, seeking merely to recover a judgment for money, the Federal Court would not be bound by the decisions of the Washington Court with reference to this arbitration clause, nevertheless, when the complainant bases its right to a lien upon the specific real property in Washington upon this contract, then the whole question becomes a question as to the rights in real property, a local question, and the Federal Court is bound by the decision of the Washington Supreme Court.

The plea, therefore, which set up this arbitration clause was at least a defense to this action.

2nd. We further contend that the clause in the contract in question herein is a condition precedent to the bringing of any suit upon the contract even under the Federal decisions.

This arbitration clause must be read by the Court in the light of the balance of the contract and with reference to the well-known rules of construction which require the Court to give to a contract a construction which renders it valid rather than one which renders it invalid.

This contract, as a whole, shows that the complainant, McClintic-Marshall Company, agreed to furnish to the Scandinavian-American Building Company the structural steel work for the building and to begin shipment within sixty days, and to make complete shipment within 120 days after

the date of the agreement, and provided that the building company should pay the complainant 85% of the full value of the shipment on the 20th day of each month, following the day of shipment, remaining 15% thirty days thereafter, and paragraph XV of the bill shows that the cross-complainant actually did send this steel forward in several shipments covering a period of four months. If this arbitration clause be construed to mean that controversies arising between the parties *while the contract was in existence* and was in process of being completed and while both parties to it were keeping it alive, should be submitted to arbitration, no court is or has been thereby ousted of any jurisdiction. Matters of dispute arising between the parties under these circumstances could not be litigated in any Court. This is substantially what the evidence and answer shows did happen. While both of the parties to this contract were keeping it in force, although it is probable that both of the parties may have considered that the other party had so breached the contract that it would be entitled to declare it terminated, yet neither party did, in fact, declare the contract terminated, but kept it alive, and while affairs were in this status, the evidence shows and the answer alleged that the building company repeatedly demanded that the complainant submit the matters of dispute between the parties to arbitration in accordance with the provisions of the contract, which said demands the complainant refused

to comply with. This provision was not, therefore, independent of the other provisions of the contract, but was an integral part of the contract as a whole, and compliance therewith is a condition precedent to any action in the Federal Court as well as in the State Court of Washington.

In the case of *Memphis Trust Company vs. Brown-Ketchum Fire Works*, 166 Fed. 398, the Circuit Court of appeals uses the following language with reference to an arbitration clause worded as follows:

"Or in any other case or contingency whatsoever in which a dispute should arise in regard to the conditions or proper interpretation."

"It is, however, now too well settled to admit of controversy that provisions in a building contract such as exist here, by which a given architect is expressly clothed with the broad authority to determine finally all matters in dispute under the contract, and by which final settlement is to be had and payments made upon architects certificates do not create a mere naked agreement to submit differences to arbitration. Nor are such provisions for arbitration merely collateral to and independent of the other provisions of the contract; but they are, on the other hand, of its very essence, and such agreement is not subject to revocation by either party, but actual or tendered compliance with the terms of the contract is a necessary condition precedent to recovery upon it; and an award made by virtue of such contract provision, in the

absence of fraud or of such gross mistake as would imply bad faith or a failure to exercise honest judgment, is binding upon both parties thereto, so far as it is confined to disputes actually subsisting and open to arbitration. The following are illustrative of the long line of authorities which announce and enforce the proposition just stated: *Kihlberg vs. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Sweeney vs. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; *Martinsburg & Patomac R. R. Co. vs. March*, 114 U. S. 549, 5 Sup. Ct. 1035; 29 L. Ed. 255; *Chicago, S. S. & C. R. R. Co. vs. Price*, 138 U. S. 185, 192, 11 Sup. Ct. 290, 34 L. Ed. 917; *Sheffield etc., Ry. Co. vs. Gordon*, 151 U. S. 285, 298, 14 Sup. Ct. 343, 38 L. Ed. 164; *U. S. vs. Gleason*, 175 U. S. 588, 602, 80 Sup. Ct. 228, 47 L. Ed. 284; *Am. Bonding Co. vs. Gibson County*, 127 Fed. 671, 62 C. C. A. 397; *Pauly Jail Building, etc., Co. vs. Hemphill County*, 62 Fed., 698, 704, 10 C. C. A. 595; *Mundy vs. Louisville & N. Ry. Co.*, 67 Fed. 633, 67, 14 C. C. A. 583; *Elliot vs. Missouri, K. & T. Ry. Co.*, 74 Fed. 707, 709, 21 C. C. A. 3; *Boyce vs. U. S. Fid. & Guar. Co.*, 111 Fed. 138, 142, 49 C. C. A., 276; *No. Am. Ry. Cons. Co. vs. McMath Surveying Co.*, 116 Fed. 169, 174, 54 C. C. A., 27; *C. & N. Ry. Co. vs. Newton*, 140 Fed. 225, 71, C. C. A. 655; *Railroad Co. vs. Cent. Lbr. Co.*, 95 Tenn. 538, 32 S. W. 635; *St. Paul & M. P. Ry. Co. vs. Bradbury*, 42 Minn. 222, 227, 44 N. W. 1."

This case is on all fours with the case at bar.

The covenant to arbitrate is practically the same in the contract under consideration there as it is in this case. Although the contractor agreed to submit the matter to arbitration, he did not do so, but breached the agreement, and refused to submit to arbitration.

There should be a distinction between agreements to arbitrate contained in contracts which have become executed before the arbitration clause becomes operative, such as insurance contracts, and contracts such as the one in question, where the arbitration clause becomes operative while the contract is still executory.

There is another distinction which is noted by the author in Wait Engineering and Architectural Jurisprudence, Sec. 335, et seq. The author calls attention to the fact that the decisions adverse to arbitration clauses have been chiefly confined to insurance and general contract obligations where the difficulties attending execution do not require their use and support. While in construction contracts the engineer or architect by reason of his skill and special training is both witness and judge. He is in the position of a judge of a higher court, possessed of all the evidence and acquainted with all and every circumstance, and therefore possesses full, adequate and complete means within himself to determine the merits of the case, and from a practical standpoint the engineer is more competent to determine the questions at issue and to form a practical judgment than are Courts and juries.

"This, it is submitted, is a true reason for the existence, and a real cause of the persistence and universal use of such stipulations."

"The magnitude, extent and great cost of engineering and architectural work commend them to the Courts for a favorable construction according to their true intent and meaning * * * Few capitalists, corporations or public institutions would invest their wealth in enterprises in which their rights and differences with contractors were to be submitted to an ordinary jury whose sympathies are distinctly with the contractor and against the so-called monopolies, and whose decisions would be based upon the knowledge and experience acquired in the shop, in trade, in husbandry, or in the practice of the polite professions."

If, while this contract was being kept alive by both the McClintic-Marshall Company and the Scandinavian-American Building Company, these disputes had been submitted to arbitration and determined by the arbitrators, then the McClintic-Marshall Company would have had the undoubted right to file and foreclose its lien in either the State or Federal Court. No one would then contend that any court had been ousted of jurisdiction by that clause. No Court should hold that if the vendor breaches his contract of sale, when the contract provides for installment deliveries as this contract does, that the vendee does not have the election to keep the contract in force and re-coup or offset his damages, but must declare the whole

contract at an end. This is contrary to the elementary law of sales. Yet that is precisely the position into which the McClintic-Marshall Company placed the Building Company in this suit. It did not ship the steel in accordance with the terms of the contract, thereby causing loss and the payment of a higher freight rate and it admitted in open Court that a part of its steel was improperly fabricated, it admitted that after it was in default but before it shipped the steel it refused to arbitrate, the Building Company was then placed in this dilemma, if it held the contract breached it had to get this steel from other sources, which would probably mean even greater delay; if it held the contract in force, it must submit to the filing and foreclosure of a lien with the great expense consequent thereto under our state statute (the McClintic-Marshall Company was allowed $12,-500.00 in attorneys' fees alone as costs in this action). Under these circumstances for the Court to hold that an agreement to determine such disputes before it became necessary to enforce lien rights is against public policy, we submit, is an erroneous conclusion. It is unreasonable under the exigencies of modern business and places the property owner at the mercy of the defaulting contractor and can have but one result, namely, to deter the construction of large improvements upon real property.

3rd. We also contend that the breach of the arbitration clause of the contract by the complain-

ant was a bar to the prosecution of this case in the Court sitting as a Court of equity.

The familiar rule that he who comes into equity must come with clean hands prevails.

In *Harcourt vs. Ramsbottom*, 1 Jac. & W. 505, Lord Eaton refused an injuction to restrain the sale of estates pursuant to an arbitrators award, made after the arbitration had proceeded and then been formally revoked by deed of the party who applied for the injunction. It was contended to sustain the award that the submission had been made a rule of court and could not be revoked but Lord Eaton ignored this matter and based his decision upon the ground of want of equity—that the complainant had not come into court with clean hands, whether he had or had not a right to revoke, whether his revocation was or was not effective and whether the award after revocation was or was not invalid.

To the same effect is the English case of *Pope vs. Duncannon*, 9 Sin. 177, 2 Jur. 178, where, although the right to breach an arbitration covenant was conceded, the court refused equitable relief to the offending party.

Where the rules of a Board of Trade provided that the difference between the members should be submitted to arbitration and the complainant had expressly contracted to submit such differences to arbitration the Court refused to prevent such arbitration in the case of *Albers vs. Spencer*, 103 S. W. 532.

Where an inventor made a contract with a manufacturer for Royalties, etc., assigning to the manufacturer certain rights, the contract having an arbitration clause in it and the inventor claimed the right to have the contract and the assignment set aside because of certain acts of the manufacturer, which he claimed were breaches of the contract, the Court refused to grant him equitable relief because he had refused to submit to arbitration under the contract. *Lesser vs. Baldridge*, 38 Mo. App. 362.

This is also illustrated by the case of *Cole vs. Cunningham*, 33 L. Ed. 538, in which the Supreme Court decided that the Massachusetts State Court could enjoin a citizen of Massachusetts from prosecuting a suit in the New York State Court by which he would have been able legally to obtain rights which the Massachusetts State Court would not have given him. Had therefore, the Scandinavian-American Building Company applied to the Pennsylvania State Courts to enjoin the McClintic-Marshall Company from prosecuting this action, the Pennsylvania Court at least would have had the *power* to have granted that injunctive relief. Had the McClintic-Marshall Company been within the jurisdiction of the State of Washington, a situation on all fours with the situation in the case of *Cole vs. Cunningham* would have been presented. In the Cole case the creditor by proceeding in New York was seeking to obtain rights superior to the rights of other creditors in the estate of an

insolvent, and by attaching property in New York, had placed himself in a position to legally enforce those preferential rights in the New York State Courts. The Massachusetts Court held this was a fraud on the Laws of Massachusetts, and enjoined him.

In this case the McClintic-Marshall Company—the creditor—by proceeding in the Federal Court is seeking preferential rights in the estate located in Washington, of the insolvent Scandinavian-American Building Company which it could not obtain either in Washington, the place where the property is situated, or in Pennsylvania, the State where it is domiciled and the state where its rights arose and completely accrued.

It would be inequitable therefore for the Federal Court to permit the McClintic-Marshall Company to gain rights as against the other general creditors of the Scandinavian-American Building Company, which it could not have had either in Washington or Pennsylvania. To do so is to permit a fraud upon the laws of both Washington and Pennsylvania, and a Court of Equity prevents fraud rather than lends its assistance to the wrongdoer.

4th. The arbitration clause contained in the contract is valid.

In this connection we desire to call the Court's attention to the public policy of the United States as the same is shown by numerous recent enactments of Congress. Labor disputes, freight rates

and various other questions of public interest are now the subjects of fixed governmental control and regulation before boards of arbitration brought into existence by statutory law. In one of the recent enactments of Congress the statement is made that the fundamental doctrine of this country is that international disputes shall be settled by arbitration.

In the numerous contracts made by the government in handling its war contracts clauses of arbitration were universally embodied.

It is interesting to note that although the rule that arbitration contracts are unenforceable was adopted from the English Common law, the Courts of England have recently repudiated this doctrine entirely with the statement that the doctrine was "judicial error". In the case of *Rederiakliebolaget Atlanten vs. Akleeselekabet Korn-og Federstof Kompagneit*, 64 L. Addn. 586, the Court will find an extensive brief filed by Amicus Curie in which the United States Supreme Court was asked to lay at rest this question and come out definitely in favor of arbitration clauses. In that case the Court refused to do so, but we submit there can be no question but what the public policy of the land and the trend of judicial thought is all in favor of such clauses.

Although we have examined innumerable authorities with reference to this matter, we submit that there are remarkably few decisions of the Supreme Court of the United States which contain

anything that can be said to be unfavorable to arbitration clauses when contained in building contracts. The decisions of the Supreme Court of the United States in construing the Wisconsin statute, which attempted to make every foreign insurance company which applied to do business in Wisconsin agree that it would not remove any cases against it to the Federal Court, are most frequently cited as authority to the effect that arbitration clauses are invalid. These decisions of course, are no authority at all except for the broad statement that the Court will not be ousted of jurisdiction in such manner.

Arbitration clauses in building contracts are sustained time and time again by the United States Courts when they contain clauses which provide that the decisions of the architect or engineer in charge of the work shall be final in all matters of dispute, between the parties. It is true that in most of these cases the Architect or engineer actually made decisions and it was therefore easy for the Court to say that the matter had already been submitted under the terms of the contract. But we submit that the distinction so made is in reality no distinction at all since ordinarily the decision of the engineer or architect can be obtained by the parties in interest without consultation with each other and without any particular hearing or act of the parties.

However, there are numerous instances in the Federal Courts where these clauses are sustained

in one way or another.

The Courts have said that where parties are competent to make contracts, arbitration clauses will be upheld and that such clauses do not oust the Court of jurisdiction, but are considered as valid and as merely disposing of auxiliary, collateral and incidental issues.

*Conners vs. U. S.*, 130 Fed. 609;
*Conners vs. U. S.*, 141 Fed. 16.

The Courts have also said that when persons fix on a certain mode by which their rights are to be ascertained, the one who seeks to enforce the agreement is bound to prove that he has done everything he could to carry it into effect and that he cannot recover on the contract unless he procures the kind of evidence required by the contract or show an adequate excuse for his inability to do so.

*United States vs. Roberson*, 9 Pet. 319, 9 L. Addn. 142;
*Hamilton vs. Liverpool*, 136 U. S. 242;
*Perkins vs. U. S.*, 16 Fed. 513.

In this connection we call the Court's attention to the fact that a clause whereby a contractor agrees to arbitrate all matters of dispute arising under the contract has been held to be a waiver of the right to file a lien. This was directly decided in the case of *New York Lumber & W. W. Company vs. Schneider*, 1 N. Y. S., 441, which was affirmed by the Court of Appeals of New York in 27 N. E., p. 4.

But whether the Court would care to go to that

length or not it seems to us, as we have stated, that equity, at least, would require the complainant in this case to come into court with clean hands when he comes, as he does, invoking the powers of the Court sitting as a court of equity. And it cannot be said that a man who deliberately makes a contract in the state of his domicile, held by the Supreme Court of the state of his domicile to be good and enforcible, is doing equity by seeking the federal jurisdiction in order to relieve himself of the burdens of his contract, and the results of his breach of that contract.

2. The lien waivers were valid and binding.

Article XIV of each of the contracts is as follows:

"And the contractor further agrees for himself, his heirs, executors and assigns to waive any and all right to mechanics' claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract."

It must be conceded that this is a valid and binding contract obligation enforcible in the State of Washington.

*Holm vs. C. M. & St. P. Ry.*, 59 Wash. 293; 109 Pac. 799;

*Gray vs. Hickey*, 94 Wash. 370; 162 Pac. 564;

*Kent Lumber Co. vs. Ward*, 37 Wash. 60; 79 Pac. 485;

*Davis vs. La Cross Hospital Assn.*, 99 N.

W. 351; 1 Ann. Cas. 950 & note;
*Hume vs. Seattle Dock Co.*, 137 Pac 752; 50 L. R. A. (N.S.) 153 & note;
*Baldwin Locomotive Works vs. Hines Lumber Co.*, 125 N. E. 400; 13 A. L. R. 1059 & note;
*Kelly vs. Johnson*, 251 Ill. 1391; 95 N. E. 1068; 36 L. R. A. (N. S.) 573 & note;
27 CYC 261, et seq.;
18 R. C. L. 104, et seq.

In *Baldwin Locomotive Works vs. Hines Lumber Co., supra*, the Supreme Court of Indiana said:

"That no public policy is involved is shown by the fact that courts of last resort in four states have declared statutes void which attempt to nullify stipulations against liens. *Palmer vs. Tingle*, 55 Ohio, 423; 45 N. E. 313; *Waters vs. Wolf*, 162 Pa. 153; 29 Atl. 646; *Kelly vs. Johnson*, 36 L. A. A. (N. S.) 573 and note; 251 Ill. 135; 95 N. E. 1068; *John Spry Lumber Co. vs. Sault Sav. Bank, Loan & T. Co.*, 77 Mich. 199; 6 L. R. A. 204; 43 N. W. 778".

It is argued that the right of lien revived when the Building Company ceased its building operations. The facts disclosed on the trial simply indicated that the lien claimants voluntarily quit their work when the bank failed and waited to see what was going to happen.

Of course, it is self-evident that a waiver of lien never becomes of any value or effect until the contract is breached by the owner. It merely lies

dormant awaiting the development of facts or circumstances that bring it into operation. We are at a loss to understand how it can be logically argued that the right of lien is automatically revived solely upon the happening of events that make it of any value. The parties contracted to waive their right of liens and resort to the personal responsibility of the owners with a full understanding that the contract might be breached and in that event they could not resort to their statutory lien rights. If they had been paid in full they certainly would have no lien rights.

In *Dux vs. Rumsey*, 190 Ill. App. 234, it was claimed that because a sub-contractor was not paid in full "the consideration for the waiver has failed". But the court refused to so hold and said:

"When parties insert in a carefully prepared contract between them provisions like section 8 of this subcontract, a reasonable interpretation of the contract requires the court to presume that some purpose was intended to be accomplished by such provision. If the construction contended for by the subcontractor here is sustained, it makes the subcontract mean that the subcontractor waives his lien in case he is paid in full. The law gives him no lien if he is paid in full. Therefore the proposed construction deprives section 8 of said contract of all meaning and leaves the contract as it would be if that section had never been written into it."

We find that the weight of authority is to the

effect that a waiver of lien is not disregarded and the lien right restored by the owners failure to pay according to the terms of the contract.

*Fuhrman vs. Frech*, 60 Ind. App. 349; 109 N. E. 781;

*Carson-Payson Co. vs. Cleveland, Etc., Ry. Co.*, 105 N. E. 503;

*Bizezinski vs. Neeves*, 93 Wis. 567; 67 N. W. 1125;

*Gray vs. Jones*, 47 Or. 40; 81 Pac. 813;

*Kelly vs. Johnson*, 251 Ill. 139; 95 N. E. 1068; 36 L. R. A. (N. S.) 573 and note;

*Long vs. Caffery*, 93 Pa. 528;

*Mathews vs. Young*, 40 N .Y. Supp. 26;

*Sanders' Pressed Brick Co. vs. Barr*, 76 Mo. App. 380;

*Cushing vs. Hurley*, 112 Minn. 83; 127 N. W. 441;

*Arizona E. R. Co. vs. Globe*, 129 Pac. 1104;

*Collinsville Mfg. Co. vs. Street*, 196 S. W.;

*Dux vs. Rumsey*, 190 Ill. App. 234;

27 CYC 266.

*Collinsville Mfg. Co. vs. Street*, 196 S. W. 284. The Plaintiff entered into a written contract with the Jones Building Company, the original contractor for the erection of a building known as Dallas Hotel, for the Southern Methodist University. By the terms of its contract the Collinsville Company was to furnish and erect the sheet metal work and copper roofing, payment being provided for monthly during the progress of the work on

the basis of eighty-five per cent of the estimated value of work done and material furnished during the preceding month. By the contract the Collinsville Company expressly waived and released any lien for labor performed and material furnished. The company proceeded with the performance of the contract until the institution of bankruptcy proceedings against the Jones Company, although for several months prior to such proceedings it had not been paid the full eighty-five per cent of the monthly estimates. The action was one to establish a lien. The court held, in affirming the judgment of the lower court, that the lien was waived and not re-established through the failure to pay as provided by the contract, nor by the bankruptcy proceedings of the principal contractor, and that the lien could not be re-established by subsequent contract made with the receiver for the Jones Company, wherein there was no waiver clause, such subsequent contract being intended to provide for the completion of the work under the original contract.

*Mowers vs. Jarrell*, 210 Ill. App. 256, holds that a waiver of lien given to enable the owner to get a loan to pay for the improvements, is supported by an adequate consideration, and not affected by the owner's subsequent default in connection with that contract.

It was claimed and the court found that there were misrepresentations made prior to the execution of the contracts. We maintain that is not sup-

ported by the testimony. We call the court's attention to Article XX of each contract which is as follows:

"Art. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except as herein set forth. This agreement cannot be changed, altered or modified in in any respect except by the mutual consent of the parties endorsed herein in writing and duly executed."

This agreement is binding and the terms of the contracts cannot be altered by oral testimony.

The contract of the Tacoma Millwork Supply Company is set forth in the transcript of record on pages 180 to 199; that of Ben Olson on pages 309 to 318; that of E. E. Davis on pages 382 to 391.

Ben Olson, President of Ben Olson Company, testified:

"Mr. Drury told me that they were going to put the $600,000 mortgage on. I took it for granted that was going to be the mortgage on the property. I had no reason to think there were other mortgages on there * * *. I knew that this $600,000 mortgage was to be put on these premises at the time I signed this contract but the mortgage was to cover the completion money, not at the beginning as I understood."

Miss Carlson, the secretary to the architect, said

she was present at the conference with the architect and contractors. She testified as follows:

"I heard a great deal of discussion, all of them in fact objected to signing the contract. To some of them the matter was explained satisfactorily and they went ahead and signed it; and others refused and had the clause stricken out. They represented that the loan was about to go through; I do not believe there was any representation that the loan had actually been made."

It cannot be said that the testimony as to misrepresentations is sufficient to justify a finding that the representations were fraudulently made. In fact, the court says the representations were incorrect but not fraudulent. 281 Fed. at page 172.

We would remind the court that there is a nice distinction between a fraudulent misrepresentation such as will give rise to an action for deceit, and an honest misrepresentation as to a material fact or condition. But since we believe under the authorities hereinafter cited that this distinction is immaterial, and the entire question of fraud and misrepresentation taken out of the case by the action of the parties themselves, we will not attempt to go into the distinction and into the different rights and remedies which follow in the two classes of cases. Assuming then that there has been a false misrepresentation established, upon which the lien claimants who waived their liens acted upon discovery of that fraud, such claimant might pursue one of two remedies. Either he

could rescind the contract, restore any benefits that he had received thereunder and sue as upon a *quantum meruit* for the value of the work done or services actually performed, or he could elect to affirm the contract and sue for damages occasioned by the fraud. As will be pointed out in the authorities cited, the remedies set forth are inconsistent one with the other, and any election to pursue the one remedy results in the exclusion of the other. In the instant case the lien claimants, Tacoma Millwork Supply Company, and Ben Olson Company, are seeking to rescind the contract so far as the clause relating to the waiver of lien is concerned, and to affirm it otherwise, and to recover damages in the shape of profits which they would have made on the contract itself had it been completely performed. By filing a notice of claim of lien embracing a claim for profits upon the contract, by bringing suit upon the contract and for damages in the shape of lost profits, and by electing in open court to treat the contract as indivisible and entire, they have elected to affirm the contract. They cannot therefore seek to rescind the one clause of the contract relating to the waiver of liens.

"Partial recision. A recision must be in toto. A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand while he shirks its disadvantages on the other, unless the two parts of the contract are so severable from each other as to form two

independent contracts."

13 C. J. Contracts, Sec. 682, P. 623, and cases cited in note 80;

*Girouard vs. Jasper*, 106 N. E. 849. (Mass.)

This was an action to enforce a mechanics' lien for labor performed. The claim for the lien was based upon a written contract as to which the court said:

"To enforce the lien filed by him in this case the petitioner declares upon the contract and alleges full performance of all its stipulations on his part to be performed. It therefore appears that the petitioner bases his claim for lien upon the complete performance of the entire contract. The contract provides that 'the balance, namely $3500, is to be paid to the said contractor after the owner has secured on said property first and second mortgages, but said payment of the balance due shall not be made later than six months from the date of the completion of the work' ".

The claim was made that false representations were made by the defendant Jaspar as to the existence of mortgages upon the property when the contract was entered into. The Supreme Court of Massachusetts reverses a judgment for the lien claimant, and dismisses the petition of the plaintiff upon the ground that at the time he filed his claim upon the contract there was nothing due by the terms of the contract, the court saying:

"The respondent contends that although the jury found that fraud was practiced upon the

petitioner by the respondent, yet the petitioner having failed to rescind the contract and having completed it after knowledge of the fraud, has waived the fraud and is bound by its terms. It is plain that if a party to a contract seeks to avoid it by reason of the fraud or failure of the other party to comply with its terms, he cannot rescind it as to some of its provisions and rely upon it as to others. In order that this lien may be maintained it must appear that the petitioner has substantially performed his part of the contract, and *it must further appear that there is nothing in the contract itself which will prevent the establishment of the lien.*" (Italics ours. * * * "If he (the petitioner) was induced to make the contract by reason of the fraudulent representations of Jaspar, on discovery thereof he could have rescinded it as a whole, and have brought an action at law for its breach, or he might have brought an action declaring upon a *quantum meruit* for the value of the labor and material furnished, or he could have availed himself of the remedy provided for the enforcement of a mechanics' lien to recover for the value of the labor and materials furnished.'

*Bernard vs. Fisher*, 177 Pac. 762 (Idaho).

The Syllabus is as follows:

"A party to a contract, the provisions of which are not separable, cannot avail himself of, and benefit by, some portions of it and repudiate others, nor can he rescind some parts of it, and enforce others. It must be nullified in toto or not at all.

Having elected to sue upon certain of its terms, he is bound by all of them."

The action was one to foreclose a lien for work done and materials furnished in the construction of an irrigation system. The action was based upon a contract dated September 10, 1912, one of the provisions of which gave the owners an option to pay for the work by the assignment of certain water rights and a certain mortgage. At the trial it appeared that the plaintiffs had received the mortgage and the notes secured thereby and also the water rights specified. Evidence offered by them to show that the mortgagor did not own the land described in the mortgage, and that the water rights were not such as he had been agreed they should receive, were excluded, and judgment went against the plaintiffs upon the counter claim of the defendants. The court said:

"Appellants (the lien claimants) do not seek to rescind the contract in toto and to recover the reasonable value of their services and materials. They do not allege that they were induced by fraud, misrepresentation or mistake to accept the water rights and mortgage, in ignorance of their real character, nor do they, having failed to return the property delivered to them or to allege any reason for their failure to do so, sue for the damage resulting from the difference between that which they received and that which they contend they were entitled to. Having retained this property they must be held to have retained it in full

payment of the amount due under the contract, and cannot be heard to say they accepted it in partial payment or on account. *They attempted in this action to avail themselves of the portion of the contract which fixes the amount of their compensation, and they cannot repudiate but must be held to be bound by the provisions thereof, which gave respondents an option to pay with water rights and a mortgage instead of money.*" (Italics ours).

*Cole vs. Smith*, 58 Pac. 1086 (Col.)

This action was one for deceit, based upon false representations made by defendant Cole, concerning the number of cattle owned by him, which he exchanged with the plaintiffs for real estate. The contract provided that in case of default in the contract in the matter of the delivery of the cattle defendant Cole would forfeit and re-transfer a portion of the real estate which he was to receive in exchange for the cattle. Judgment went for the plaintiffs in the lower court, but was reversed, the court saying:

"When the plaintiffs discovered that they were defrauded, at least two remedies were open to them: First, to rescind the contract; second, to sue for damages on account of the deceit. These remedies are inconsistent; not concurrent. Both were not open to plaintiffs; and when once they made their election to sue for damages they were bound thereby, and could not thereafter pursue the other remedy. In choosing, as they did, to bring this action for damages, they thereby affirmed the con-

tract, and, if they recover at all, it must be upon the case as made, and not upon some other theory. Had they elected to rescind, the contract must have been rescinded in toto; and when they did elect to sue for damages on account of the deceit the contract must be affirmed in toto, and not affirmed in part and disaffirmed in part. *Potter vs. Titcomb*, 22 Me. 300; *Bank vs. Groves*, 12 How. 51; *Cobb vs. Hatfield*, 46 N. Y. 533, 536; *Schiffer vs. Dietz*, 83 N. Y. 300; *Moller vs. Tuska*, 87 N. Y. 166; *Nichols vs. Pinner*, 18 N. Y. 295, 312; *Joslin vs. Cowee*, 52 N. Y. 90; 8 Am. & Eng. Ec. Law (1st Ed.) 650 et seq."

*Federal Life Ins. Co. vs. Maxam*, 117 N. E. 801 (Ind.).

"The act of bringing an action, or taking legal steps to enforce a contract, amounts to an election by the party not to rescind it on account of anything known to him, and where a party institutes a suit for damages for the breach of an executory contract, his action in so doing is notice to the other party of his election to treat the contract as breached, and at an end, except for the purpose of ascertaining the damages occasioned by such breach. An election so made is conclusive against the party making it. 3 Elliott on Contracts, Sec. 2026; *Cole vs. Smith*, 26 Colo. 506; 58 Pac. 1086-1087; *Conrow vs. Little*, 115 N. Y. 387-393; 22 N. E. 346; 5 L. R. A. 693; *Graves vs. White*, 87 N. Y. 463-465."

*Collison vs. Ream*, 144 N. W. 1050.

"It is an elementary maxim that one who seeks

equity must do equity. He cannot accept that portion of the contract which is beneficial to him and at the same time reject and seek to be relieved from that portion which he believes to be injurious to his interests." (Opinion p. 1053.)

See also *Cheney vs. Bierkamp*, 145 Pac. 691, at 692 (Colo.).

*Walker vs. McMillan*, 160 Pac. 1062.

*J .L. Owens Co. vs. Doughty*, 110 N. W. 78 (N. D.).

As to what constitutes an election of remedies and the election thereof we refer the court to the opinion of Sanborn, J., in *Stuart vs. Hayden*, 72 Fed. 402, at p. 411, affirmed in 169 U. S. 1, 42 Law. Ed. 639.

"One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud. He may affirm the contract and sue for his damages; or he may rescind it and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other because a sale can not be valid and void at the same time."

*Sea Nat'l Bank vs. Powles*, 33 Wash. 21, at pp. 27-28.

The contracts in which the parties waived their right of lien should be sustained and enforced and the decree reversed.

3. The appointment of a Receiver bars the action as a lien foreclosure suit.

As the Court will notice by a reference to the order appointing the Receiver herein the Court made him a general receiver and his duties and powers were in no wise limited to the confines of this action or to preserve the property pending the final determination of the suit. He was appointed upon the application of the Tacoma Mill Work & Supply Company (Tr. p. 40) who were asserting a lien but who the Court thereafter found had no lien as to the greater portion of their account. (Par. XXV, Tr. pp. 512-13-14.) One of the grounds for his appointment was the insolvency of the Scandinavian-American Building Company. While it is elementary that the appointment of a receiver does not disturb existing liens or equities in the property, it is equally well established that the property of the insolvent from the time of the appointment of the Receiver is *in custodia legis* and that persons asserting rights therein or liens thereon while it remains *in custodia legis* must apply to the Court appointing the receiver to fix the amount and priority of their claims in the property. The Court had ample power in the case as a receivership case to determine all of these questions. And the reason for that rule is well illustrated by the case at bar. In this case the court allowed the lien claimants approximately $30,000.00 in costs, expenses and attorneys' fees. (Tr. p. 477 et seq.) While we believe it is im-

probable that this "steel skeleton" will bring enough to pay all lien claimants in full, yet it is possible that it will, and in that event this $30,000 would be saved to the general creditors.

When a corporation becomes insolvent and its assets pass into the hands of a receiver, the situation is analogous to bankruptcy and the appointment of a trustee. And it is elementary that thereafter lien claimants would be required to at least suspend existing lien foreclosure suits and present their claims in the bankruptcy court. The situation is also analogous to the death of an individual owner in which case, in Washington at least, the claimant would have to suspend his action and present his claim to the administrator.

*Crow Co. vs. Adkinson Construction Co.*, 67 Wn., 420.

The practice in Washington has been to file the lien and then to proceed in the receivership proceeding, not to foreclose, but to establish the amount and priority of the lien as against the property or funds in the receiver's hands. This is illustrated by the case of *Brown vs. Hunt & Mottet Co.*, 111 Wn., 564, wherein among other things the Court says, quoting from *Withrow Lumber Co. vs. Glasgow Inv. Co.*, 101 Fed. 863:

" 'The appointment of a receiver does not alter or affect the rights of the parties to property, or give or take from them any liens they have acquired or are entitled to'. *It in no way prevents one from filing his claim of lien in the office of the County*

*Auditor. It only changes the procedure and possibly postpones the collection.*"

*In Atlantic Trust Company vs. Dana*, 128 Fed. 209, Judge Van Devantes uses very similar words:

"The existing receivership did not impair the pledge, or render the property or its income less subject to the mortgage of the trust company, than if the property was still in the possession of the water company. *It altered the situation only to the extent that it affected the manner in which the pledge should be asserted to make it effective.*"

"By taking the property through the receiver, the Court has placed itself, so far as such senior mortgages are concerned, in the position of the mortgagor, *and that their only remedy is by application to the court.*"

(Quoted from *Seibert vs. Minneapolis & St. L. Ry. Co.*, 52 Minn., 246.)

In *Berwend White Coal Co. vs. Steamship Co.*, 166 Fed. 782-795, the court says:

"This court interposed by its receiver and it should, on this intervening petition, give the lienor a remedy, *although in form of a wholly different character from that provided by statute.*"

In *Commonwealth Roofing Co. vs. N. A. Trust Co.*, 135 Fed. 984, the Court says:

"By appointing a receiver of the property upon which the lien attached, the Circuit Court assumed the control thereof, and of the lienor, *and stood in its path * * *.*"

The Federal Court in the case of *Blair vs. St.*

*Louis Etc. Ry. Co.*, 25 Fed. 2, held where the lien claimant did establish his lien in the State Court subsequent to the appointment of a receiver by the Federal Court, although the suit of the lien claimant was first in point of time, that nevertheless he was not entitled on petition to the Federal Court in the receivership matter to have his lien judgment established as a prior lien; that his remedy in the first instance was by petition in the receivership proceeding, and he having refused to avail himself of that remedy, that the court would not assist him.

That the lien claimant ordinarily, in the absence of peculiar circumstances, must proceed by petition to the court appointing the receiver is shown by the cases of *Cohen vs. Gold Creek M. Co.*, 95 Fed. 580, and *Scott vs. Farmers L. & T. Co.*, 69 Fed. 17, where the circumstances warranting it, the lien claimants were allowed to foreclose by suit.

That the lien claimant's rights to foreclose in the ordinary way is suspended by the appointment of a receiver has been directly decided.

*Fisher Foundry Co. vs. Susquehannah Co.*, 23 Lanc. L. Rev. (Pa.) 398;

*De Vasson vs. Blackstone*, 7 Fed. Cas. 3, 840; 6 Batchf. 235.

The very fact that the procedure for which we contend, has been universally followed by practitioners, it seems to us, should have great weight with this Court.

The sanction of the practice adopted, we sub-

mit, would lead to very unfortunate results, as is illustrated by this case. If the building in this case should sell for enough to pay the lien claimants, in accordance with the provisions of the decree, it will mean that there has been $30,000.00 wasted, as far as the general claimants are concerned; this sum, would be enough to give them a substantial dividend. The underlying reason for the appointment of a receiver is to place the fund or property in the hands of the court, not only for proper distribution, but for economical administration—the foreclosure in this case was a useless thing, the same result would have been achieved by taking the evidence merely for the purpose of establishing the amount and rank of the various claims, and this unnecessary burden of costs would all have been saved.

We therefore respectfully submit that the decree in this case should be reversed.

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